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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

1 GINA CARANO,

2 Plaintiff,

3 v.

4 THE WALT DISNEY COMPANY,
5 LUCASFILM LTD. LLC, and HUCK-
6 LEBERRY INDUSTRIES (US) INC.,

7 Defendants.

8 Case No. 2:24-cv-01009-SPG-SK

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**DEFENDANTS THE WALT DIS-
NEY COMPANY, LUCASFILM
LTD. LLC, AND HUCKLEBERRY
INDUSTRIES (US) INC.'S REPLY
IN SUPPORT OF MOTION TO
CERTIFY FOR INTERLOCU-
TORY APPEAL UNDER 28 U.S.C.
§ 1292(b) AND STAY OF PRO-
CEEDINGS**

Date: September 25, 2024

Time: 1:30 p.m.

Judge: Hon. Sherilyn Peace Garnett

Courtroom: 5C

	Page(s)
1 INTRODUCTION.....	1
2 ARGUMENT	2
3 I. THERE IS A CONTROLLING QUESTION OF LAW	2
4 II. THERE ARE SUBSTANTIAL GROUNDS FOR DIFFERENCE OF	
5 OPINION	2
6 III. AN INTERLOCUTORY APPEAL AND STAY WOULD	
7 MATERIALLY ADVANCE THE LITIGATION	7
8 CONCLUSION.....	9
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

	Page(s)
1	Cases
2	<i>Associated Press v. NLRB</i> , 301 U.S. 103 (1937) 6
4	<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000) 3
6	<i>Green v. Miss United States of America</i> , 52 F.4th 773 (9th Cir. 2022)..... 1, 3, 5, 8
8	<i>Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.</i> , 515 U.S. 557 (1995) 4
10	<i>ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union</i> , 22 F.4th 1125 (9th Cir. 2022)..... 2
12	<i>McDermott v. Ampersand Publ'g, LLC</i> , 593 F.3d 950 (9th Cir. 2010)..... 6
14	<i>Moore v. Hadestown Broadway LLC</i> , ____ F. Supp. 3d ___, 2024 WL 989843 (S.D.N.Y. Mar. 7, 2024)..... 3, 4
16	<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) 6
18	<i>Plaskett v. Wormuth</i> , 18 F.4th 1072 (9th Cir. 2021)..... 2
20	<i>Redgrave v. Boston Symphony Orchestra, Inc.</i> , 855 F.2d 888 (1st Cir. 1988) 4
21	<i>Reese v. BP Expl. (Alaska) Inc.</i> , 643 F.3d 681 (9th Cir. 2011)..... 2
22	Statutes
23	28 U.S.C. § 1292(b)..... 1, 2, 8, 9
24	
25	
26	
27	
28	

1 INTRODUCTION

2 Carano’s opposition does not seriously engage with the standard for certifying
3 an interlocutory appeal under 28 U.S.C. § 1292(b). She nowhere acknowledges
4 that potentially dispositive First Amendment questions should be resolved “at the
5 earliest possible junction.” *Green v. Miss United States of America*, 52 F.4th 773,
6 800 (9th Cir. 2022). She nowhere disputes that Disney’s First Amendment defense,
7 if successful, would terminate this litigation. She nowhere contests that reasonable
8 jurists could disagree—and indeed, have disagreed—on the legal questions decided
9 by this Court. And she nowhere refutes Disney’s showing that her discovery de-
10 mands themselves raise important First Amendment controversies that will require
11 repeated intervention by this Court to resolve.

12 Carano’s opposition instead essentially contends that review is not warranted
13 because this Court’s ruling was correct. Carano misses the point. *Every* petition
14 for interlocutory appeal involves a ruling the issuing court believes to be correct.
15 What matters under § 1292(b) is whether the ruling is subject to reasonable dis-
16 agreement, and—especially critical here—whether broader interests justify threshold
17 resolution of that disagreement. Those standards are certainly satisfied in this case.
18 In most civil actions, the rights and interests at stake can be properly vindicated
19 through full litigation, including appeal from a final order. Not so here. The First
20 Amendment protects private actors not only against government regulation of their
21 expressive statements, but also against government investigation into the thought
22 processes underlying their expressive choices. Yet searching, government-sanc-
23 tioned inquiry into Disney’s values and decisionmaking is exactly what Carano
24 promises in this case, as her opposition and discovery demands confirm. If, as Disney
25 contends, the First Amendment protects Disney’s artistic choices from state in-
26 trusion, that protection cannot be adequately secured through direct appeal after fi-
27 nal judgment. The motion for interlocutory appeal and stay should be granted.
28

ARGUMENT

I. THERE IS A CONTROLLING QUESTION OF LAW

The first requirement to certify an order is that it decide a “controlling question of law.” 28 U.S.C. § 1292(b); *see* Mot. 3. Carano does not and could not dispute that the First Amendment questions presented in Disney’s petition are controlling in this action because answers favorable to Disney would compel dismissal of Carano’s complaint. And, while Carano disputes that the Court decided a “legal question,” Opp. 4, she neither acknowledges nor addresses the Ninth Circuit’s holding that a ruling on a Federal Rule of Civil Procedure 12(b)(6) motion necessarily “raises a question of law.” *Plaskett v. Wormuth*, 18 F.4th 1072, 1083 (9th Cir. 2021).¹ This prong is satisfied.

II. THERE ARE SUBSTANTIAL GROUNDS FOR DIFFERENCE OF OPINION

The second requirement is that there be a “substantial ground for difference of opinion” on the legal issues raised. 28 U.S.C. § 1292(b); *see* Mot. 3-12. To satisfy this prong, Disney need not show that the Court’s Order was incorrect. All that it must demonstrate is that “reasonable judges might differ” on the questions the Order addressed. *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (internal quotation marks omitted).

Carano's opposition fails to engage with that standard. She merely repeats the merits arguments asserted in her prior papers, but the issue is whether reasonable jurists could disagree with those arguments. They certainly could, and Carano does not show otherwise.

¹ Carano cites *ICTSI Oregon, Inc. v. International Longshore & Warehouse Union*, 22 F.4th 1125 (9th Cir. 2022), in which the Ninth Circuit concluded that a “post-trial order” raised a question of fact because “the district court primarily relied on facts from the record.” *Id.* at 1130, 1132. Here, of course, there is no factual record; the only question is about the *legal* sufficiency of Carano’s complaint.

1 **A. The *Dale* deference standard.** In *Boy Scouts of America v. Dale*, 530
2 U.S. 640 (2000), the Supreme Court held that courts must “give deference to an as-
3 sociation’s assertions regarding the nature of its expression” and “give deference to
4 an association’s view of what would impair its expression.” *Id.* at 653. While this
5 Court’s Order acknowledged that deference standard, it held that it does not apply
6 “at a motion to dismiss stage.” Order 15. The Court thus discounted Disney’s
7 statements—featured prominently in Carano’s own complaint—that expressing its
8 art through Carano would contravene Disney’s values. *See* Order 6.

9 As Disney’s motion observed (at 5-6), that approach conflicts with Judge
10 VanDyke’s concurring opinion in *Green*, which applied the *Dale* deference stand-
11 ard at the pleading stage. *See* 52 F.4th at 805. Carano’s only response is to mis-
12 characterize *Green*’s procedural posture. According to Carano, Judge VanDyke
13 “reviewed the facts of the case,” Opp. 6, but as Disney has explained (and as the de-
14 cision itself makes clear), the only discovery conducted in *Green* was on a topic
15 that is not contested here, Mot. 5. In analyzing the critical aspects of the pageant’s
16 First Amendment defense—a defense materially identical to Disney’s defense in
17 this action—Judge Van Dyke considered only the complaint’s allegations. *Id.*
18 Judge VanDyke’s application of the *Dale* deference standard at the pleading stage
19 simply cannot be reconciled with this Court’s ruling that deference has no role in
20 reviewing a complaint, confirming that reasonable jurists could disagree on the is-
21 sue.

22 Carano likewise ignores the portions of *Moore v. Hadestown Broadway LLC*,
23 ___ F. Supp. 3d __, 2024 WL 989843 (S.D.N.Y. Mar. 7, 2024), that demonstrate dis-
24 agreement on this same question. The court in *Moore* held—based only on the
25 complaint—that requiring the Broadway show to cast certain performers would vio-
26 late the show’s First Amendment right to express itself freely. *Id.* at *20. Carano
27 ignores that holding altogether, focusing instead on the distinct part of the opinion
28 addressing the actor’s claim that she was retaliated against for speaking to a union

1 representative. *Id.* at *13; *see* Opp. 7. That discussion had no bearing on the aspect
2 of *Moore* relevant here: the *Moore* court’s holding, at the pleading stage, that
3 “[c]hanging the composition of Hadestown’s cast affected whether its performances
4 conveyed Defendant’s intended message.” 2024 WL 989843, at *18.

5 Finally, Carano makes the chilling—but erroneous—assertion that the First
6 Amendment protects Disney’s artistic expression only to the extent jurors eventu-
7 ally find a “message in *The Mandalorian*” that is intended “to promote any particu-
8 lar ‘values.’” Opp. 6. Decisions about whether and how an artistic speaker should
9 convey its values through its performances are not for the government, a court, or a
10 jury to make. The Supreme Court has spoken clearly: the First Amendment pro-
11 tects the “choice of a speaker not to propound a particular point of view,” even if
12 the speaker’s own expression does “not produce a particularized message.” *Hurley*
13 *v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574-75 (1995).
14 Reasonable jurists—including all nine Justices in *Hurley*—could certainly disagree
15 with Carano’s view that government can decide whether an expressive entity’s val-
16 ues are closely enough aligned with its messages to justify the latter’s protection.

17 **B. Off-the-job speech.** Disney’s motion also demonstrated (at 7-9) the rea-
18 sonable grounds for disagreement about the extent to which an expressive entity
19 may consider the effects of a performer’s “off-the-job political speech” on the artis-
20 tic message the entity seeks to convey in its performance. Order 19. In particular,
21 both *Dale and Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (1st
22 Cir. 1988), make clear that an individual’s off-the-job political speech very much
23 can affect her employer’s intended message, and thus can be taken into account in
24 casting and employment decisions.

25 Carano’s response is difficult to follow. She argues that “there are no facts to
26 support Defendants’ claims that Carano’s off-the-job comments had any effect on
27 their speech,” Opp. 7, but her own complaint alleges that Disney declared her off-
28 the-job speech to be inimical to Disney’s values, *see* Compl. ¶ 34 (“Disney’s then-

1 CEO Bob Chapek has been quoted as saying Carano was fired ‘because she didn’t
2 align with Company values.””). Moreover, to the extent her position is that Disney
3 must adduce facts proving that the artistic message of *The Mandalorian* was ad-
4 versely affected by her comments, *see* Opp. 8, 13, her argument only underscores
5 why *Dale*’s deference standard must apply at the outset: Carano does and cannot
6 explain how a jury could *ever* be instructed to identify the “true” messages con-
7veyed in an artistic performance, the importance of those messages to the speaker,
8 the validity of the speaker’s stated concerns about how those messages are con-
9veyed and received, and so on. As *Dale*, *Redgrave*, and other cases make clear,
10 those matters are solely for the speaker to decide—they are not contestable “facts”
11 to be resolved through discovery, motions, and jury trials.

12 That essential premise is well illustrated by *Redgrave*, regardless whether its
13 analysis is dicta, as Carano asserts. Opp. 8. *Redgrave* is relevant not because of its
14 precedential force, but because it demonstrates how other jurists could reasonably
15 disagree with this Court’s ruling. If that ruling is correct, then the state in *Redgrave*
16 could have permissibly punished the Boston Symphony Orchestra for refusing to
17 perform its opera with Vanessa Redgrave as its lead narrative performer, despite the
18 Orchestra’s stated concerns that her highly controversial public commentary on
19 Middle East political issues would distract from and disrupt the Orchestra’s own
20 preferred artistic message. In rejecting that position, the *Redgrave* court did not re-
21 quire the Orchestra to produce “evidence” that its performance would be “compro-
22 mised or ineffective” if it were forced to employ Redgrave in a lead role. 855 F.2d
23 at 905. Rather, the First Circuit rested its analysis on the common-sense point
24 that—as the Ninth Circuit put it much more recently—there is no “daylight between
25 speech and speaker” when it comes to how art is received and understood. *Green*,
26 52 F.4th at 781. Because the Court’s ruling rejects that view, and perceives day-
27 light between Carano’s controversial off-the-job speech and the artistic message
28

1 Disney seeks to convey in *The Mandalorian*, *Redgrave* shows that reasonable ju-
2 rists can disagree with that position.²

3 **C. Monetary liability and injunctive relief.** The Court’s Order asserts that
4 while the First Amendment does not necessarily prohibit a court from holding Dis-
5 ney liable for refusing to cast Carano as a lead performance, the First Amendment
6 likely *would* prohibit a court from requiring Disney to cast Carano. Order 19. As
7 Disney’s motion showed (at 9-10), reasonable jurists could disagree with this
8 claimed distinction and conclude that imposing damages liability for expressive
9 acts is an indirect way to regulate such expression. *See, e.g., N.Y. Times Co. v. Sul-
10 livan*, 376 U.S. 254 (1964). Indeed, Carano does not attempt to defend the distinc-
11 tion; instead she simply complains that “any concern over possible remedies is
12 premature.” Opp. 9. No, it is not. Disney’s point is not about *which* remedy may
13 be appropriate; it is that *no* remedy can be appropriate if its objective is to regulate
14 artistic speech. In other words, if the state cannot regulate speech directly through a
15 judicial injunction, it is impossible to see why the state can pursue the *same regulatory objective* through damages liability. More precisely for present purposes, rea-
16 sonable jurists certainly could disagree that the choice of remedy makes a differ-
17 ence in this context.

18
19 **D. Employment precedents.** Finally, Disney’s motion argued (at 10-12)
20 that a reasonable jurist could decline to distinguish key cases merely because they
21 did not arise in the “employment context.” Order 12; *see id.* at 21.

22 Carano does not defend the distinction or deny that reasonable jurists could
23 conclude that the employment context is irrelevant. Rather, she simply denies that

24
25 ² Carano also rehashes her argument that this case is like *Associated Press v. NLRB*,
26 301 U.S. 103 (1937), and its progeny. *See* Opp. 8. But the Court did not rely on
27 that argument in its Order, and for good reason: the Ninth Circuit has squarely held
28 that *Associated Press* does not apply to actions that “affect[] the expressive con-
tent” of a work. *McDermott v. Ampersand Publ’g, LLC.*, 593 F.3d 950, 962 (9th
Cir. 2010). Carano cannot wish that holding away.

1 the Order distinguishes cases on that basis. Opp. 10. Of course it does. “As an ini-
2 tial matter,” the Order emphasizes, “neither *Dale* nor *Hurley* arose in the employ-
3 ment context.” Order 12. And the Order says the Ninth Circuit’s decision in *Green*
4 “is not an employment lawsuit but a case arising under Oregon public accommoda-
5 tions law.” Order 21. The Court presumably did not proffer those statements as
6 idle observations for the benefit of the curious. This perceived distinction clearly
7 mattered to the Court. But reasonable jurists could see it differently and think the
8 employment context of this case has no bearing on Disney’s right to decide how to
9 perform its own art without interference by the state.

10 * * * *

11 The Court’s Order held that Carano’s complaint did not establish the ele-
12 ments of a successful First Amendment defense. Key to that holding were various
13 legal conclusions: (1) that Disney was not entitled to deference at this stage, and so
14 the Court need not take at face value its stated view (as included in the complaint’s
15 allegations) of what would impair its expression; (2) that Disney needed to show
16 through empirical evidence that Carano’s off-the-job speech would impair Disney’s
17 message; (3) that the First Amendment could permit holding Disney liable even in
18 circumstances where an injunction could not issue; and (4) that several potentially
19 on-point precedents were less meaningful because they were not employment cases.
20 At this stage, Disney does not need to establish that those views were unreasonable
21 or even erroneous. Disney instead must show only that reasonable judges could ap-
22 proach each of those questions differently. As the discussion above indicates,
23 courts and judges *have already* taken variant approaches to these issues, confirming
24 that the second criterion for interlocutory appeal is met.

25 **III. AN INTERLOCUTORY APPEAL AND STAY WOULD MATERI-
26 ALLY ADVANCE THE LITIGATION**

27 The final prong of the § 1292(b) analysis is whether an interlocutory appeal
28 would “materially advance the ultimate termination of the litigation.” 28 U.S.C.

1 § 1292(b); *see* Mot. 12-15. That standard is satisfied here, including because a
2 Ninth Circuit decision reversing the Order would terminate or streamline the suit.
3 And Carano barely musters a contrary argument: her only real point is that there is
4 no possibility she would lose on appeal. Opp. 11. Because reasonable jurists can
5 see the issues here differently, *see supra* at 2-7, Carano’s argument on this prong
6 fails.

7 Nor does Carano persuasively oppose a stay of discovery during the pen-
8 dency of any interlocutory appeal. She complains that a stay would delay adjudica-
9 tion of this matter, Opp. 11, but she has forfeited any such concerns: Carano her-
10 self delayed filing this suit until February 2024, almost exactly three years after
11 Disney cut ties with her, just as the limitations period was about to expire. *See* ECF
12 No. 1. And in any event, Disney would not oppose any reasonable request by
13 Carano to expedite proceedings on appeal.

14 Carano’s substantive arguments about discovery, meanwhile, confirm that an
15 interlocutory appeal and stay are appropriate. *See* Opp. 12-13.³ Carano asserts the
16 right to probe Disney’s artistic and political values, and she even seeks to obtain
17 Disney’s employees’ campaign-contribution histories. *See id.* But Carano does not
18 disagree that, if Disney has a threshold First Amendment defense to this suit, Dis-
19 ney and its employees should be protected against intrusive state inquiry into their
20 values and thought processes. *See* Mot. 13-15. That is precisely why the Ninth
21 Circuit has underscored “the importance of resolving First Amendment cases at the
22 earliest possible junction,” so as to “avoid forcing the parties through unnecessary
23 and protracted litigation.” *Green*, 52 F.4th at 800. Section 1292(b) review and a
24 stay pending review are clearly warranted for that reason here.

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³ Carano complains in passing that Disney has propounded discovery requests of its
28 own. Opp. 12. Of course, Disney’s motion for a stay of discovery would also
cover its requests.

CONCLUSION

For the foregoing reasons, the Court should certify its Order Denying Defendant's Motion To Dismiss for interlocutory appeal under 28 U.S.C. § 1292(b). If the § 1292(b) certification is granted, the Court should stay proceedings pending resolution of the interlocutory appeal.

Dated: September 11, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants The Walt Disney Company, Lucasfilm Ltd. LLC, and Huckleberry Industries (US) Inc., certifies that this brief contains 2,659 words, which complies with the word limit of Local Rule 11-6.1.

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